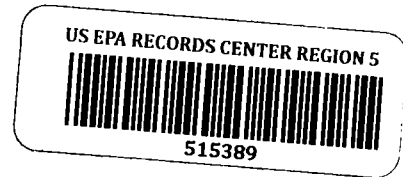


Note to Gene Lucero:



Attached is a copy of a Notice of Deposition for Lee Thomas in the Reilly Tar (Minnesota) litigation. The notice calls for Mr. Thomas to appear for a deposition in Minneapolis on August 22, 1984. Reilly is seeking to depose Mr. Thomas about the Record of Decision that he signed June 6. The Department of Justice attorney on the case (David Hird) has scheduled an oral argument on a motion for a protective order to dismiss the Notice on August 16; our brief is due August 2.

Also attached is a memo from David Hird outlining several arguments he proposes in opposing the deposition. Briefly, they are:

- 1) the Record of Decision is administrative rulemaking and therefore Reilly is barred from inquiring beyond the administrative record in challenging the decision;
- 2) the decision making process behind the Record of Decision is protected by the deliberative process privilege;
- 3) Mr. Thomas is a senior Agency official who should not be subject to deposition in a case in which he has not been personally involved.

I recommend that we argue the latter position in our brief and before the Magistrate. To support our argument, DOJ will need an affidavit from an EPA official stating Mr. Thomas' status and duties.

Also attached are recent briefing materials on the case. I am available to discuss this case further at your convenience.

Chris Grundler

*Motion in opposition
to deposition — 8-2-84*



U.S. Department of Justice

90-7-1-21

Washington, D.C. 20530

July 12, 1984

Deborah Woitte, Esq.
Office of Enforcement and
Compliance Monitoring
U.S. Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C.

Re: United States v. Reilly Tar & Chemical Corp.
(D. Minn.)

Dear Deborah:

Attached is the copy of the Notice of Deposition for Lee M. Thomas in the above referenced case. The Notice calls for Mr. Thomas to appear for a deposition in Minneapolis on August 22. I have scheduled oral argument on a motion for a protective order to quash the Notice on August 16. Under the local rules our brief is due to be filed on August 2.

Reilly is seeking to depose Mr. Thomas about the record of decision that he signed. The Agency may wish to consider whether in our motion we should argue that the record of decision is an administrative rulemaking and that Reilly is barred from inquiring beyond the administrative record in challenging the decision. Also, the Agency should consider whether it wishes us to argue that the decision making process behind the record of decision is protected by the deliberative process privilege.

In any event, we should argue that as Assistant Administrator, Mr. Thomas is a senior Agency official who should not be subject to a deposition in a case in which he is not been personally involved. To support that argument, I need an affidavit from an EPA official stating:

- (1) Mr. Thomas' status as presidential appointee and his position in EPA's hierarchy.
- (2) The scope of Mr. Thomas' duties under CERCLA, RCRA and other statutes.

- (3) The estimated number of sites that EPA will address under CERCLA in the next few years and the estimated number of sites that will require remedial action in that time period.
- (4) Only Mr. Thomas or someone acting in his behalf may sign a remedial record of decision. Also, identify the legal basis for that statement.
- (5) EPA may not authorize a remedial action without a record of decision.
- (6) Under the National Contingency Plan, the on-scene coordinator has the responsibility of proposing the remedial action to the Assistant Administrator.
- (7) Paul Bitter, the on-scene coordinator for the Reilly Tar matter, proposed the remedial action for the Assistant Administrator's selection in the Reilly Tar matter.
- (8) Assistant Administrator Thomas' involvement in the Reilly Tar matter consists only of general oversight and the approval of the record of decision.

Please notify all persons at EPA, including Mr. Thomas' office, who need to be involved in the decision making process about what positions we will take before the court.

Sincerely yours,

Assistant Attorney General
Land and Natural Resources
Division

By:



David Hird, Attorney
Environmental Enforcement Section

Enclosure

cc: Samuel I. Gutter

Hird

DORSEY & WHITNEY

A Partnership Including Professional Corporations

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July 5, 1984

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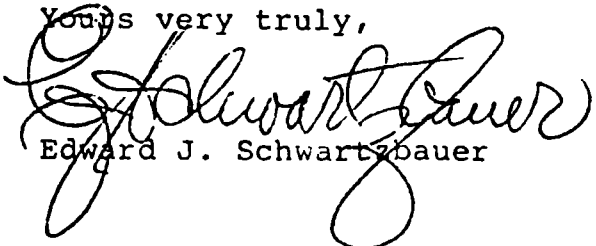
James T. Swenson, Esq.
Mackall, Crounse & Moore
1600 TCF Tower
Minneapolis, Minnesota 55402

Re: U.S.A., et al. v. Reilly Tar
& Chemical Corp., et al.
Civil No. 4-80-469

Gentlemen:

Enclosed herewith and served upon you by United States
mail please find a copy of Notice of Taking Oral Deposition.

Yours very truly,


Edward J. Schwartzbauer

EJS:ml
Enclosure

cc: Robert Leininger, Esq.
Paul C. Erby, Esq.

90-7-1-21

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Civil No. 4-80-469

Plaintiff,

and

STATE OF MINNESOTA, by its
Attorney General Hubert H.
Humphrey, III, its Department
of Health, and its Pollution
Control Agency,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION;
HOUSING AND REDEVELOPMENT AUTHORITY
OF ST. LOUIS PARK; OAK PARK VILLAGE
ASSOCIATES; RUSTIC OAKS CONDOMINIUM,
INC.; and PHILLIP'S INVESTMENT CO.,

Defendants,

and

NOTICE OF TAKING
ORAL DEPOSITION

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

TO: James M. Rosenbaum, United States Attorney, Francis X. Hermann, Assistant United States Attorney, 110 South Fourth Street, Minneapolis, Minnesota 55401, and David Hird, Attorney, Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530, attorneys for Plaintiff, United States of America; and

Hubert H. Humphrey III, Attorney General, State of Minnesota, William P. Donohue, Special Assistant Attorney General, Paul G. Zerby, Special Assistant Attorney General, Dennis M. Coyne, Special Assistant Attorney and Stephen Shakman, Special Assistant Attorney General, 1935 West County Road B2, Roseville, Minnesota 55113, attorneys for Plaintiff-Intervenor State of Minnesota; and

Wayne G. Popham, Allen Hinderaker, Rolfe Worden, Gary Macomber, and Popham, Haik, Schnobrich, Kaufman & Doty, Ltd., 4344 IDS Center, Minneapolis, Minnesota 55402, attorneys for Plaintiff-Intervenor, City of St. Louis Park and Defendant, Housing and Redevelopment Authority of St. Louis Park, Minnesota; and

Jerre A. Miller, Vesely & Miller Suite 400, Norwest Bank Building, 1011 South First Street, Hopkins, Minnesota 55343, attorney for Plaintiff-Intervenor, City of Hopkins; and

Laurance R. Waldoch, Lindquist & Vennum,, 4200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402, attorney for Defendant, Oak Park Village Associates; and

James T. Swenson, Mackall, Crounse & Moore, 1600 TCF Tower, Minneapolis, Minnesota 55402, attorney for TCF Service Corporation, successor in interest to Defendant, Rustic Oaks Condominium, Inc.; and

Thomas W. Wexler, Peterson, Engberg & Peterson, 700 Title Insurance Building, Minneapolis, Minnesota 55401, attorney for Defendant Phillip's Investment Company.

PLEASE TAKE NOTICE that the Defendant, Reilly Tar & Chemical Corporation, will take the following deposition at the time and place indicated, upon oral examination,

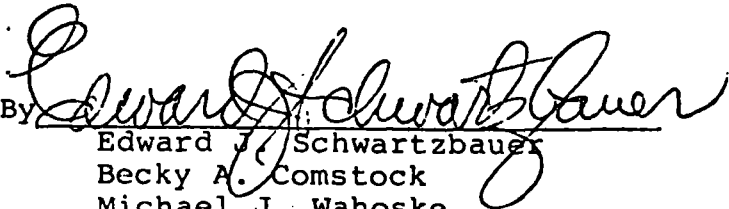
before a Notary Public, or before some other person duly qualified to administer oaths, pursuant to the Federal Rules of Civil Procedure. The oral examination will continue from day to day until completed.

Lee M. Thomas
2200 First Bank Place East
Minneapolis, Minnesota 55402

August 22, 1984
9:30 o'clock a.m.

Dated: July 5, 1984.

DORSEY & WHITNEY

By 
Edward J. Schwartzbauer
Becky A. Comstock
Michael J. Wahoske

2200 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600

Attorneys for Defendant Reilly Tar
& Chemical Corporation

REILLY TAR & CHEMICAL CORPORATION
St. Louis Park, MN

Background

From 1917 until 1972, Reilly Tar was engaged in the business of coal tar distillation and pressure treatment of wood products at its plant site in St. Louis Park, Mn. Wastes from the operation were disposed of on the site and in a network of ditches that discharged to an adjacent wetland. The wastes contained many compounds, including polynuclear aromatic hydrocarbons (PAHs), some of which are carcinogenic. Several aquifers have been contaminated, many of which provide drinking water for local communities.

On or about September 4, 1980 the United States filed a complaint under §7003 of RCRA. This complaint was amended in September, 1981 to add CERCLA §106 and §107 counts.

Two cooperative agreements have been awarded to Minnesota to reconstruct wells, conduct a complete off-site well survey, test the State's proposed gradient system to control migration of contamination and to conduct an RI/FS.

Reilly Tar is the States top priority site and is included in Group I on the NPL.

Current Status

- ° Negotiations with Reilly Tar were suspended in late February
- ° The RI/FS has been completed and Lee Thomas has signed a Record of Decision for a phase I remedial action. Region V is drafting a unilateral order requiring Reilly Tar to implement EPA's ROD.
- ° The DOJ has recently received a new settlement proposal from Reilly Tar. The proposed remedy is apparently quite similar to EPA's ROD and the proposal includes reimbursing EPA \$700,000 for past costs.
- ° Still at issue is the relationship between Reilly Tar and the City of St. Louis Park, i.e., who is to do what. Reilly proposes to fund the remedial action and envisions the City to monitor and operate the system. Our concern is how to ensure the City's performance and enforce any Consent Decree. Reilly Tar must retain liability. The State of Minnesota, nonetheless, is encouraged by recent developments.
- ° Reilly Tar has issued a notice of deposition to Lee Thomas for August 22, 1984, presumably to query him on the Record of Decision. The DOJ is drafting a motion for protective order and will need an affidavit from EPA.

- ° The Judge ruled on the U.S. motion for summary judgment on Reilly Tar's affirmative defenses on laches, the constitutionality of CERCLA, and an NPDES permit issue. The judge did not decide either the first two issues, essentially ruling that that they would be decided at trial. The Court ruled in the government's favor as to the last issue.